

§ 601.601(d)(2)(ii)(b) of this chapter), provide any additional guidance that may be necessary or appropriate for requesting and granting individual determinations under this section. For example, such guidance may specify the circumstances in which an employer may request an individual determination and factors to be taken into account in deciding whether to grant a favorable individual determination. In addition, such guidance may describe situations that automatically fail the administrative scrutiny requirement.

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**§ 1.414(r)-7 Determination of the employees of an employer's qualified separate lines of business.**

(a) *Introduction*—(1) *In general.* This section provides the rules for determining the employees of each qualified separate line of business operated by an employer. Paragraph (a)(2) of this section lists the specific provisions of the regulations for which these rules apply. Paragraph (b) of this section provides the procedure for assigning the employees of the employer among the qualified separate lines of business of the employer and for determining the day or days on which such assignments must be made. Under this procedure, each employee (i.e., a substantial-service employee or a residual shared employee as defined in § 1.414(r)-11(b)(2) and (4)) is assigned to a single qualified separate line of business in a consistent manner for all purposes listed in paragraph (a)(2) of this section with respect to the testing year and plan years beginning within the testing year. Paragraph (c) of this section provides methods for allocating residual shared employees among qualified separate lines of business.

(2) *Purposes for which this section applies.* This section applies solely for purposes of determining whether—

(i) A separate line of business satisfies the statutory safe harbor of § 1.414(r)-5(b) for a testing year (see § 1.414(r)-5(b)(3) for the employees taken into account for this purpose);

(ii) A separate line of business satisfies the merger and acquisition safe harbor of § 1.414(r)-5(d) for a testing year (see § 1.414(r)-5(d)(2) for the em-

ployees taken into account for this purpose);

(iii) A separate line of business satisfies the average benefits safe harbor of § 414(r)-5(f) for a testing year (see § 414(r)-5(f)(4) for the employees taken into account for this purpose);

(iv) A separate line of business satisfies the minimum or maximum benefits safe harbor of § 414(r)-5(g) for a testing year (see § 1.414(r)-5(g)(6) for the employees taken into account for this purpose);

(v) A plan of the employer satisfies sections 410(b) and 401(a)(4) for a plan year (see § 414(r)-8(d)(3) for the employees taken into account for this purpose); or

(vi) A plan of the employer satisfies section 401(a)(26) for a plan year (see § 414(r)-9(c)(3) for the employees taken into account for this purpose).

(b) *Assignment procedure*—(1) *In general.* To apply the provisions listed in paragraph (a)(2) of this section with respect to a testing year or plan year, as the case may be, each of the employees taken into account under that provision must be assigned to a qualified separate line of business of the employer on one or more testing days (or section 401(a)(26) testing days) during the year. The first day for which this assignment procedure is required for a testing year is the first testing day. See § 414(r)-11(b)(6), (7) and (8) (definitions of “testing day”, “first testing day” and “section 401(a)(26) testing day”). Section § 414(r)-8 may require that the assignment procedure be repeated for testing days that fall after the first testing day (including testing days that fall after the close of the testing year in a plan year that begins in the testing year). Accordingly, new employees may be taken into account for the first time on these later testing days who were not taken into account on the first testing day. Section § 414(r)-9 may have the same effect with respect to section 401(a)(26) testing days that fall after the first testing day.

(2) *Assignment for the first testing day.* The employees taken into account under a provision described in paragraph (a)(2) of this section with respect to the first testing day for a testing

year are assigned among the employer's qualified separate lines of business by applying the following procedure to each of those employees—

(i) An employee who is a substantial-service employee with respect to a qualified separate line of business within the meaning of § 414(r)-11(b)(2) must be assigned to that qualified separate line of business;

(ii) An employee who is a residual shared employee within the meaning of § 414(r)-11(b)(4) must be assigned to a qualified separate line of business under paragraph (c) of this section.

Each employee assigned to a qualified separate line of business under paragraph (b)(2)(i) of this section or this paragraph (b)(2)(ii) remains assigned to the same qualified separate line of business for all purposes with respect to the testing year listed in paragraph (a)(2) of this section and for all plan years beginning in that testing year. Once an employee is assigned to a qualified separate line of business with respect to a particular testing day or section 401(a)(26) testing day, that employee remains assigned to that qualified separate line of business after the employee terminates employment. However, after the employee terminates employment, that employee will in most cases not be taken into account with respect to a subsequent testing day or section 401(a)(26) testing day for purposes of applying one or more of the provisions in paragraph (a)(2) of this section.

(3) *Assignment of new employees for subsequent testing days.* After the first testing day for the testing year, the employees taken into account under a provision described in paragraph (a)(2) of this section with respect to a subsequent testing day (or a section 401(a)(26) testing day) for the testing year may include one or more employees who previously have not been assigned to a qualified separate line of business for any purpose listed in paragraph (a)(2) of this section with respect to the testing year. An employee may not previously have been assigned to a qualified separate line of business for any purpose with respect to the testing year if, for example, the employee has just been hired or has just become a nonexcludable employee. Previously

unassigned employees are assigned among the employer's qualified separate lines of business by applying the procedure in paragraph (b)(2) of this section to those employees. In determining whether an employee who is not employed by the employer during the testing year is a substantial-service or a residual shared employee with respect to a qualified separate line of business, § 414(r)-3(c)(5) is applied with reference to services performed by the employee during a period in the immediately succeeding testing year that are reasonably representative of the employee's services for the employer.

(4) *Special rule for employers using annual option under section 410(b).* Notwithstanding the fact that paragraphs (b)(1) through (b)(3) of this section generally only require employees to be assigned on testing days beginning with the first testing day, if a plan is tested under section 410(b) using the annual option of § 410(b)-8(a)(4) (including for purposes of the average benefit percentage test), employees must be assigned on every day of the plan year of that plan for purposes of this paragraph (b). Thus, all employees who provide services at any time during the plan year of a plan that is tested using the annual option of § 1.410(b)-8(a)(4) must be assigned to a line of business even if they terminate employment before the first testing day within the meaning of § 414(r)-11(b)(7) of the testing year in which the plan year begins.

(c) *Assignment and allocation of residual shared employees—(1) In general.* All residual shared employees must be allocated among an employer's qualified separate lines of business under one of the allocation methods provided in paragraphs (c)(2) through (5) of this section. An employer is permitted to select which method of allocation to apply for the testing year to residual shared employees. However, the same allocation method must be used for all of the employer's residual shared employees and for all purposes listed in paragraph (a)(2) of this section with respect to the testing year.

(2) *Dominant line of business method of allocation—(i) In general.* Under the method of allocation in this paragraph (c)(2), all residual shared employees are allocated to the employer's dominant

line of business. This method does not apply unless the employer has a dominant line of business within the meaning of paragraph (c)(2)(ii) or (c)(2)(iv) of this section. If an employer has more than one dominant line of business under this paragraph (c), the employer must select which qualified separate lines of business is its dominant line of business.

(ii) *Dominant line of business.* An employer's dominant line of business is that qualified separate line of business that has an employee assignment percentage of at least 50 percent.

(iii) *Employee assignment percentage—*  
 (A) *Determination of percentage.* The employee assignment percentage of a qualified separate line of business is the fraction (expressed as a percentage)—

(1) The numerator of which is the number of substantial-service employees with respect to the qualified separate line of business who are assigned to that line of business under paragraph (b) of this section; and

(2) The denominator of which is the total number of substantial-service employees who are assigned to all qualified separate lines of business of the employer under paragraph (b) of this section.

(B) *Employees taken into account.* The employee assignment percentage is calculated solely with respect to employees who are taken into account for purposes of satisfying section 410(b) with respect to the first testing day. Therefore, this percentage is calculated only once for all purposes with respect to a testing year. The employees described in section 410(b)(3) and (4) are excluded. However, section 410(b)(4) is applied with reference to the lowest minimum age requirement applicable under any plan of the employer, and with reference to the lowest service requirement applicable under any plan of the employer, as if all the plans were a single plan under § 1.410(b)-6(b)(2).

(iv) *Option to apply reduced percentage.* An employer is permitted to deter-

mine whether it has a dominant line of business by substituting 25 percent for 50 percent in paragraph (c)(2)(ii) of this section. This option is available for a testing year only if the qualified separate line of business satisfies one of the following requirements:

(A) The qualified separate line of business accounts for at least 60 percent of the employer's gross revenues for the employer's latest fiscal year ending in the testing year.

(B) The employee assignment percentage of the qualified separate line of business would be at least 60 percent if collectively bargained employees were taken into account.

(C) Each qualified separate line of business of the employer satisfies the statutory safe harbor of § 1.414(r)-5(b), the average benefits safe harbor of § 1.414(r)-5(f), or the minimum or maximum benefits safe harbor of § 1.414(r)-5(g). Whether a qualified separate line of business satisfies one of these safe harbors is determined after the application of this section, including the assignment of all residual shared employees under this paragraph (c)(2).

(D) The employee assignment percentage of the qualified separate line of business is at least twice the employee assignment percentages of each of the employer's other qualified separate lines of business.

(v) *Examples.* The following examples illustrate the application of the method of allocation in this paragraph (c)(2).

*Example 1.* (i) Employer A operates four qualified separate lines of business as determined under § 1.414(r)-1(b) for the testing year, consisting of a software developer, a health food products supplier, a real estate developer, and a ski equipment manufacturer. In applying this section for the first testing day with respect to the testing year, Employer A determines that it has a total of 21,000 employees, of whom 10,000 are substantial-service employees not excludable under section 410(b)(3) or (b)(4). Pursuant to paragraph (b) of this section, these 10,000 employees are assigned among Employer A's qualified separate lines of business as follows:

	Software developer	Health food	Real estate	Ski equipment
Substantial-Service Employees .....	2,500	1,000	2,500	4,000
Percentage Assigned to QSLOB .....	25%	10%	25%	40%

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(ii) Under these facts, Employer A is not permitted to apply the method of allocation in paragraph (c)(2)(ii) of this section, because none of its qualified separate lines of business satisfies the 50 percent requirement in paragraph (c)(3)(ii) of this section.

*Example 2.* The facts are the same as in *Example 1*, except that, after allocating all residual shared employees to the ski equipment line of business, the software, ski equipment and health food supplier lines of business each would satisfy the statutory safe harbor of § 1.414(r)-5(b), and that the real estate development line of business would satisfy the minimum or maximum benefits safe harbor of § 1.414(r)-5(g). Under these facts, Employer A is permitted to apply the method of allocation in this paragraph (c)(2) to allocate all its residual shared employees to the ski equipment line of business, because the employee assignment percentage

of the ski equipment line of business exceeds 25 percent and each qualified separate line of business satisfies either the statutory safe harbor of § 1.414(r)-5(b) or the minimum or maximum benefits safe harbor of § 1.414(r)-5(g).

*Example 3.* (i) The facts are the same as in *Example 1*, except that, Employer A chooses not to satisfy the minimum or maximum benefits safe harbor of § 1.414(r)-5(g). Instead, Employer A combines the real estate developer and ski equipment manufacturer into a single line of business. As a result, Employer A has three qualified separate lines of business as determined under § 1.414(r)-1(b). Assume that no residual shared employee becomes a substantial-service employee as a result of the new combination. Employer A's substantial-service employees are assigned among Employer A's qualified separate lines of business as follows:

	Software developer	Health food	Real estate/ski equipment
Substantial-Service Employees .....	2,500	1,000	6,500
Percentage Assigned to QSLOB .....	25%	10%	65%

(ii) Under these facts, Employer A is permitted to apply the method of allocation in this paragraph (c)(2) to allocate all its residual shared employees to the combined real estate development and ski equipment manufacturing line of business, because more than 50 percent of Employer A's substantial-service employees that are taken into account for the first testing day are assigned to that qualified separate line of business.

*Example 4.* (i) The facts are the same as in *Example 1*, except that, of the remaining 11,000 employees of Employer A, 10,000 employees are substantial-service employees who are collectively bargained employees. Pursuant to paragraph (b) of this section, the 10,000 substantial-service employees and the 10,000 substantial-service employees who are collectively bargained employees are assigned among Employer A's qualified separate lines of business as follows:

	Software developer	Health food	Real estate	Ski equipment
Substantial-Service Employees .....	2,500	1,000	2,500	4,000
Percentage of total substantial-service employees assigned to QSLOB .....	25%	10%	25%	40%
Substantial-Service Employees (including collectively bargained employees) .....	2,500	1,000	2,500	14,000
Percentage of total employees (including collectively bargained employees) assigned to QSLOB .....	12.5%	5%	12.5%	70%

(ii) Thus, the ski equipment line of business satisfies the 25-percent threshold in paragraph (c)(2)(iv) of this section. In addition, the ski equipment's percentage of substantial-service employees is at least 60 percent when taking into account substantial-service employees who are collectively bargained employees and therefore satisfies the requirement under paragraph (c)(2)(iv)(B) of this section. Under these facts, Employer A is permitted to apply the method of allocation in this paragraph (c)(2) to allocate all

its residual shared employees to the ski equipment line of business.

(3) *Pro-rata method of allocation*—(i) *In general.* Under the method of allocation in this paragraph (c)(3), all residual shared employees are allocated among an employer's qualified separate lines of business in proportion to the employee assignment percentage of each qualified separate line of business, as determined under paragraph (c)(2)(iii) of this section.

(ii) *Allocation procedure.* The procedure for allocating residual shared employees under the method in this paragraph (c)(3) is as follows—

(A) The number of highly compensated residual shared employees who are allocated to each qualified separate line of business is equal to the product determined by multiplying the total number of highly compensated residual shared employees of the employer by the employee assignment percentage determined with respect to the qualified separate line of business under paragraph (c)(3)(i) of this section;

(B) The number of nonhighly compensated residual shared employees who are allocated to each qualified separate line of business is equal to the product determined by multiplying the total number of nonhighly compensated residual shared employees of the employer by the employee assignment percentage determined with respect to the qualified separate line of business under paragraph (c)(3)(i) of this section;

(C) For purposes of this procedure, the employer is permitted to determine which highly compensated residual shares employees and which nonhighly compensated residual shared employees are allocated to each qualified separate line of business, provided that the required number of highly and nonhighly compensated residual shared employees are allocated to each qualified separate line of business.

(iii) *Examples.* The following example illustrates the application of the method of allocation in this paragraph (c)(4).

*Example 1.* The facts that are the same as in *Example 1* under paragraph (c)(2)(v) of this section except that there are no additional residual shared employees after the first testing day. Of Employer A's 1,000 residual shared employees, 800 are highly compensated employees and 200 are nonhighly compensated employees. Employer A applies the pro-rata method of allocation in this paragraph (c)(3). Under these facts, the 1,000 residual shared employees are allocated among Employer A's qualified separate lines of business as follows:

	Software developer	Health food	Real estate	Ski equipment
Substantial-Service Employees .....	2,500	1,000	2,500	4,000
Percentage Assigned to QSLOB ("employee assignment percentage") .....	25%	10%	25%	40%
Residual Shared HCEs .....	200	80	200	320
Allocated to QSLOB .....	(25% $\times$ 800)	(10% $\times$ 800)	(25% $\times$ 800)	(40% $\times$ 200)
Residual Shared NHCEs .....	50	20	50	80
Allocated to QSLOB .....	(25% $\times$ 200)	(10% $\times$ 200)	(25% $\times$ 200)	(40% $\times$ 200)

(4) *HCE percentage ratio method of allocation—(i) In general.* Under the method of allocation in this paragraph (c)(4), all residual shared employees are allocated among an employer's qualified separate lines of business according to the highly compensated employee percentage assignment ratio of each qualified separate line of business.

(ii) *Highly compensated employee percentage assignment ratio.* For purposes of this paragraph (c)(4), the highly compensated employee percentage assignment ratio of a qualified separate line of business is the fraction expressed as a percentage—

(A) The numerator of which is the percentage of all employees who have previously been assigned to the qualified separate line of business under this

section with respect to the testing year who are highly compensated employees; and

(B) The denominator of which is the percentage of all employees who have previously been assigned to any qualified separate line of business under this section with respect to the testing year who are highly compensated employees.

Thus, the highly compensated employee percentage assignment ratio of each of the employer's qualified separate lines of business is recalculated each time a residual shared employee is allocated to a qualified separate line of business under this paragraph (c)(5).

(iii) *Allocation procedure.* The procedure for allocating all residual shared

employees under the method in this paragraph (c)(4) is as follows—

(A) If there are any qualified separate lines of business with a highly compensated employee percentage assignment ratio of less than 50 percent (as determined immediately before the employee is allocated to a qualified separate line of business), the highly compensated residual shared employee must be allocated to one of these qualified separate lines of business;

(B) If there are any qualified separate lines of business with a highly compensated employee percentage assignment ratio of greater than 200 percent (as determined immediately before the employee is allocated to a qualified separate line of business), the nonhighly compensated residual shared employee must be allocated to one of these qualified separate lines of business;

(C) If there are no qualified separate lines of business with a highly compensated employee percentage assignment ratio less than 50 percent, a highly compensated residual shared employee may be allocated to any qualified separate line of business with a highly compensated employee percentage assignment ratio of no more than 200 percent, provided that the employee's allocation to the qualified separate line of business does not cause its highly compensated employee percentage assignment ratio to exceed 200 percent (as determined immediately after the employee is allocated to the qualified separate line of business);

(D) If there are no qualified separate lines of business with a highly compensated employee percentage assignment ratio greater than 200 percent, a nonhighly compensated residual shared employee may be allocated to any qualified separate line of business with a highly compensated employee percentage assignment ratio of no less than 50 percent, provided that the employee's allocation to the qualified separate line of business does not cause its highly compensated employee percentage assignment ratio to fall below 50 percent (as determined immediately after the employee is allocated to the qualified separate line of business);

(E) For purposes of this procedure, the employer is permitted to determine

which highly compensated residual shared employees and which nonhighly compensated residual shared employees are allocated to each qualified separate line of business, provided that the requirements of this paragraph (c)(4)(iii) are satisfied.

(5) *Small group method*—(i) *In general.* Under the method of allocation provided for in this paragraph (c)(5), each residual shared employee is allocated to a qualified separate line of business chosen by the employer. This method does not apply unless all of the requirements of paragraphs (c)(5)(ii), (iii), and (iv) of this section are satisfied.

(ii) *Size of group.* The total number of the employer's residual shared employees allocated under this paragraph (c) must not exceed three percent of all of the employer's employees. For this purpose, the employer's employees include only those employees taken into account under paragraph (c)(2)(iii)(B) of this section.

(iii) *Composition of qualified separate line of business.* The qualified separate line of business to which the residual shared employee is allocated must have an employee assignment percentage under paragraph (c)(2)(iii) of this section of at least ten percent. In addition, the qualified separate line of business to which the residual shared employee is allocated must satisfy the statutory safe harbor under § 1.414(r)-5(b) after the employee is so allocated.

(iv) *Reasonable allocation.* The allocation of residual shared employees under the small group method provided for in this paragraph (c)(5) must be reasonable. Reasonable allocations generally include allocations that are based on the level of services that the residual shared employees provide to the employer's qualified separate lines of business, the similar treatment of similarly situated residual shared employees, and other bona fide business criteria; in contrast, an allocation that is designed to maximize benefits for select employees is not considered a reasonable allocation. For example, allocation of all residual shared employees who work in the same department, or at the same location, to the same qualified separate line of business would be an indication of reasonableness. However, allocation of a group of

similarly situated residual shared employees to a qualified separate line of business for which they provide minimal services might not be considered reasonable. In addition, the allocation of the professional employees of a department to one qualified separate line of business and the allocation of the support staff of the same department to a different qualified separate line of business would not be reasonable.

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**§ 1.414(r)-8 Separate application of section 410(b).**

(a) *General rule.* If an employer is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with § 1.414(r)-1(b) for a testing year, the requirements of section 410(b) must be applied in accordance with this section separately with respect to the employees of each qualified separate line of business for purposes of testing all plans of the employer for plan years that begin in the testing year (other than a plan tested under the special rule for employer-wide plans in § 1.414(r)-(c)(2)(ii) for such a plan year). Conversely, if an employer is not treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with § 1.414(r)-1(b) for a testing year, the requirements of section 410(b) must be applied on an employer-wide basis for purposes of testing all plans of the employer for plan years that begin in the testing year. See § 1.414(r)-1(c)(2) and (d)(6). Paragraph (b) of this section explains how the requirements of section 410(b) are applied separately with respect to the employees of a qualified separate line of business for purposes of testing a plan. Paragraph (c) of this section explains the coordination between sections 410(b) and 401(a)(4). Paragraph (d) of this section provides certain supplementary rules necessary for the application of this section.

(b) *Rules of separate application—(1) In general.* If the requirements of section 410(b) are applied separately with respect to the employees of each qualified separate line of business operated by the employer for a testing year, a plan (other than a plan that is tested under the special rule for employer-

wide plans in § 1.414(r)-1(c)(2)(ii) for a plan year) satisfies the requirements of section 410(b) only if—

(i) The plan satisfies section 410(b)(5)(B) of an employer-wide basis; and

(ii) The plan satisfies section 410(b) on a qualified-separate-line-of-business basis.

(2) *Satisfaction of section 410(b)(5)(B) on an employer-wide basis—(i) General rule.* Section 410(b)(5)(B) provides that a plan is not permitted to be tested separately with respect to the employees of a qualified separate line of business unless the plan benefits a classification of employees found by the Secretary to be nondiscriminatory. A plan satisfies this requirement only if the plan satisfies either the ratio percentage test of § 1.410(b)-2(b)(2) or the nondiscriminatory classification test of § 1.410(b)-4 (without regard to the average benefit percentage test of § 1.410(b)-5), taking into account the other applicable provisions of §§ 1.410(b)-1 through 1.410(b)-10. For this purpose, the non-excludable employees of the employer taken into account in testing the plan under section 410(b) are determined under § 1.410(b)-6, without regard to the exclusion in § 1.410(b)-6(e) for employees of other qualified separate lines of business of the employer. Thus, in testing a plan separately with respect to the employees of one qualified separate line of business under this paragraph (b)(2), the otherwise nonexcludable employees of the employer's other qualified separate lines of business are not treated as excludable employees. However, under the definition of "plan" in paragraph (d)(2) of this section, these employees are not treated as benefiting under the plan for purposes of applying this paragraph (b)(2).

(ii) *Application of facts and circumstances requirements under nondiscriminatory classification test.* The fact that an employer has satisfied the qualified-separate-line-of-business requirements in §§ 1.414(r)-1 through 1.414(r)-7 is taken into account in determining whether a classification of employees benefiting under a plan that falls between the safe and unsafe harbors satisfies § 1.410(b)-4(c)(3) (facts and circumstances requirements). Except